No. 92-1722

Supreme Court, U.S.
FILED
MAR - 8 1993
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DELL O. McCUAIG - PETITIONER

vs.

OFFICE OF PERSONNEL MANAGEMENT - RESPONDENT

SUPPLEMENTARY APPENDIX

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

# SUPPLEMENTARY APPENDIX

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**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

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| DELL O. MC CUAIG,<br>Appellant,<br><br>v.<br><br>OFFICE OF PERSONNEL MANAGEMENT,<br>Agency.<br><br>(CSA 1 566 075) | ) | DOCKET NUMBER<br>SE0831920094-I-1<br><br><br><br>DATE: Jun-2 1992 |

Dell O. McCuaig, Quilcene, Washington, pro se.

Ernest B. Vogel, Esquire, Federal Way, Washington, for the intervenor.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on February 25, 1992, because it

does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**SEATTLE REGIONAL OFFICE**

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| DELL O. MC CUAIG,<br>Appellant,<br><br>v.<br><br>OFFICE OF PERSONNEL MANAGEMENT,<br>Agency.<br>(CSA 1 566 075) | DOCKET NUMBER<br>SE-0831-92<br>-0094-I-1<br><br><br><br>DATE: February 25, 1992 |

Dell O. McCuaig, Quilcene, Washington, pro se.

Ernest B. Vogel, Esquire, Federal Way, Washington, for the intervenor.

Kenneth R. Brown, Washington, DC, for the agency.

BEFORE

Sidney E. Farcy
Administrative Judge

## INITIAL DECISION

On December 9, 1991, Dell O. McCuaig filed an appeal from a reconsideration determination of the Office of Personnel Management that found

his former spouse was entitled to a portion of his retirement benefit under a qualifying domestic relations order.[1] Appellant's former spouse, Hwa Cha McCuaig, was allowed to intervene in the action under 5 C.F.R. § 1201.34, since her interest in the retirement benefit is directly affected by the appeal.[2] The Board has jurisdiction over this matter pursuant to 5 U.S.C. §§ 7701 and 8347 (d) and 5 C.F.R. § 831.110 (1991).

Appellant did not request a hearing of his appeal, which was decided based upon the written submissions of the parties.[3] For the reasons set forth below, the reconsideration determination is AFFIRMED.

ANALYSIS

Background facts

Appellant has been retired from Federal

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[1] Appeal file tab 1.

[2] Appeal file tabs 6, 7, and 8.

[3] Appeal file tab 1.

service since 1973.[4] In November of 1990 appellant and intervenor were divorced and the resultant property settlement included a document captioned "Qualified Domestic Relations Order," which awarded intervenor a percentage of appellant's retirement benefit and provided a survivor annuity.[5] Intervenor ("Alternate Payee" in the court order) was specifically awarded ". . . 40 percent (40%) of Participant's gross monthly annuity, reduced for survivor's annuity" and the option "to elect a post retirement survivor's annuity to the extent of the interest awarded her in Paragraph 3 of this Order." The Office of Personnel Management determined that this Order constituted a fqualifying court order under 5 U.S.C. § 8345(j) and 5 C.F.R. § 831.1704 and affirmed this

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[4] Appeal file tab 5, subtab 6.

[5] Appeal file tabs 1 and 5. Appelant had previously elected a survivior annuity for intervenor, but had sought to terminate it following the dissolution of their marriage. Appeal file tab 1.

determination on reconsideration.[6] This appeal followed.

Legal standard

As pertinent to this appeal, the statute in question provides that:

> Payments under this subchapter which would otherwise be made to an . . . annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

5 U.S.C. § 8345(j)(1)

Regulations promulgated by the Office of Personnel Management provide that the agency will review the court order to determine whether it is the first order terminating the marriage and whether it includes the following: an express statement that the retirement benefit is to be divided and/or that a retirement benefit

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[6] Appeal file tab 5.

is the source of payment; a statement that indicates it contemplates direct payment of the benefit by the United States; a statement that a fixed amount is to be paid, or that a readily ascertainable amount is to be paid, such as a percentage of the annuity. 5 C.F.R. § 831.1704 (1991).[7] In addition, if the order awards a former spouse annuity, it will be reviewed to determine if the marriage terminated prior to May 7, 1985, or if certain other events occurred before that date. *Id.*

Appellant's argument

Appellant raises three basic arguments. First, he contends that Federal court decisions hold that an annuity is compensation and not property, and hence, Congress may not authorize

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[7] That portion of the regulation requiring that the order dividing the property be part of the first order dissolving the marriage and, in essence, precluding bifurcated proceedings has been invalidated by the Board where the order is the the first order relating to the division of the marital estate. *Love v. Office of Personnel Management,* 46 M.S.P.R. 641 (1991), *review granted,* 935 F. 2d 279 (Fed. Cir. 1991) (Table).

the division of a retirement annuity in a property settlement or divorce proceeding.[8] Second, he submits that given the length of his service, compared to the length of his marriage, the division ordered by the court is unreasonable.[9] Third, he urges that the statute is limited to court approved property settlement agreements and thus, in the absence of the annuitant's agreement, no distribution of the annuity may be made.[10] None of these arguments is persuasive.

Analysis

In the absence of a clear conflict with a Federal statute, state law governs in the areas of domestic relations, including such matters as the distribution of property in the course of the dissolution of a marriage. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979); *In re*

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[8] Appeal file tab 1, subtab 3.

[9] Appeal file tab 5, subtabs 3 and 4.

[10] Appeal file tab 10.

*Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (1974), *cert. denied*, 419 U.S. 825, *reh. denied*, 419 U.S. 1060 (1974). Congress, however, has the authority to determine the character of a federally created benefit, such as the retirement annuity at issue here. *Hisquierdo*, at 590. In enacting the legislation in question, Congress specifically provided for distribution of the annuities in accordance with the orders of State courts in order to avoid any frustration of domestic relations policy via the Supremacy Clause of the United States Constitution and existing law, which insulated retirement annuities from legal process. S. Rep. No. 1084, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.C.C.A.N. 1380, 1381. That Federal courts may have treated retirement annuities or related benefits differently in other contests does not undercut the unequivocal statement of 5 U.S.C. § 8345(j) and the Congressional intent to allow state courts to treat these benefits as property subject to

distribution.

Appellant's argument that the dividison of his annuity ordered by the court is unfair or inappropriate is addressed to the wrong forum. To the extent that he seeks to challenge the validity of the property division, his argument should be addressed to the court which issued the order. *See* 5 C.F.R. § 831.1709(b) (1991) (providing for withholding of awarded annuity funds if an action challenging the validity of the order is filed within 30 days of OPM's notice to the annuitant). I note in passing, however, that while appellant's argument concerning the *pro rata* distribution of this annuity is appropriate for purposes of determining the character of the property (community or separate), under Washington State law all property is available for distribution, regardless of its character. *Donovan v. Donovan,* 25 Wash. App. 691, 612 P.2d 387 (1980) (pro rata approach to characterization of retirement benefits); *Friedlander v. Friedlander,* 80 Wash. 2d 293,

494 P.2d 208 (1972) (availability of all property).

Appellant's final argument is that the distribution in question did not arise from a property settlement agreement and that the statute only contemplates distributions in compliance with a court-approved property settlement agreement.[11] He argues that is the intent of the statute were to honor all court orders issued in the course of a dissolution of marriage, it would be unnecessary to specifically mention agreed settlements. I do not find this argument to be persuasive. The statute is phrased in the disjunctive and plainly states that either a division of property imposed by the court or one reached by mutual agreement and approved by the court will be honored. That the statute might have been more concisely worded does not detract from its plain meaning.

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[11] Id.

Qualifying court order

While not directly addressed by appellant, I have reviewed the order to determine whether it complies with the requirements of the statute and the regulations. In this case, the order expressly provides for the award of a percentage of appellant's annuity to the intervenor and provides for direct payment of that benefit to the intervenor by OPM, and that it was entered after the effective date of the law, all in conformity with the statute and regulation. Thus, I find that the order is a qualifying court order.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD: _____

Sidney E. Farcy
Administrative Judge

**NOTICE TO APPELLANT**

This initial decision will become final on March 31, 1992, unless a petition for review is

filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow will tell you how and when to fiel with the Board or the federal court. These instrucitons are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW, Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decesion becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

**NOTICE TO AGENCY/INTERVENOR**

The agency intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.